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No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX FOR FIRST NATIONAL MAINTENANCE CORPORATION

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Petition for Writ of Certiorari filed October 8, 1980
Certiorari granted January 12, 1981

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APPENDIX A

Judgment of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-4167

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS
HON. AMALYA L. KEARSE
Circuit Judges

HON. MORRIS E. LASKER,
District Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FIRST NATIONAL MAINTENANCE CORP.,

Respondent.

A PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the petition for review be and it hereby is granted in accordance with the opinion of this court with costs to be taxed against the respondent.

A. DANIEL FUSARO,
Clerk

by

(Sgd.) ARTHUR HELLER,
Deputy Clerk

Opinion of the Court

NLRB v. FIRST NAT'L. MAINTENANCE CORP.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

v.

FIRST NATIONAL MAINTENANCE CORP.,

No. 79-4167, July 9, 1980

Application for enforcement of an NLRB order (242 NLRB No. 72). Enforcement granted.

William R. Stewart, Deputy Assistant General Counsel and L. Joseph Ferrara (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, with them on brief), for petitioner.

Milman, Naness & Pollack (Sanford E. Pollack, of counsel), Hewlett, N.Y., for respondent.

Before TIMBERS and KEARSE, Circuit Judges, and LASKER, District Judge.*

Full Text of Opinion

LASKER. District Judge:—This case presents the issue whether an employer has the duty to bargain with the union representing its employees as to a decision to close part of its operations.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

The National Labor Relations Board (NLRB or the Board) seeks enforcement of its order of May 23, 1979[1] which, based on the findings of the Administrative Law Judge that First National Maintenance Corporation (FNM) violated sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1), by refusing to bargain with the union[2] representing certain of its employees, directs FNM to bargain with the union, to reinstate those employees, and to grant them back pay.

I.

FNM is in the business of providing cleaning and maintenance services to commercial customers. During the spring of 1977, FNM serviced between two and four nursing homes. The approximately 35 employees who staffed its operation at the Greenpark Care Center (Greenpark) chose the union as their representative on March 31, 1977 and the NLRB certified the union on May 11th. On July 12th, the union wrote to FNM requesting a meeting to negotiate a collective bargaining agreement. There is no evidence that FNM responded to that letter.

During the spring and summer of 1977, FNM determined that it was losing money at Greenpark, and discontinued its services there as of August 1st. It did not notify the union before taking this action. On July 28th, FNM informed its Greenpark employees that they would be discharged on July 31st.

The same day, the union's vice president, Edward Wecker, telephoned FNM's secretary-treasurer and one-third shareholder, Leonard Marsh, requesting that FNM "stay on" at Greenpark. Marsh answered that FNM could not continue its

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1 The NLRB's order is at 242 NLRB No. 72, 101 LRRM 1177.

2 The Union elected and certified is District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

operations there because of financial reasons. When Wecker asked whether they could meet to discuss the situation, Marsh said, " 'We have nothing to discuss.' " The union and FNM had no further communications until the unfair labor practice charges were filed.

The NLRB found that FNM had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1), and ordered FNM to bargain with the union upon request as to the decision to close its Greenpark operation; if the Greenpark services were resumed, to offer reinstatement to the discharged employees, and if no agreement to resume operation were reached, to bargain as to the effects of the closing and to establish preferential hiring for the terminated employees at its other operations. The order also awarded back pay to the discharged employees.

II.

FNM does not dispute that it had a duty to respond to the July 12th letter sent by the union requesting a meeting to negotiate a collective bargaining agreement, and the parties have stipulated as to FNM's duty to bargain as to the effects of the Greenpark closing. Consequently, the only issue before us relates to FNM's duty to bargain as to its decision to terminate its Greenpark services.

Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(d), together make it an unfair labor practice for an employer to refuse to bargain with the union "with respect to wages, hours and other terms and conditions of employment." See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 164 (1971); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964). The present issue, then, is whether the decision to close the Greenpark operation affected the employees' "terms and conditions of employment" within the meaning of the statute.

The seminal case on the subject is Fibreboard Paper Products Corp. v. NLRB, supra, 379 U.S. 203 (1964). There the Court held to be an unfair labor practice the employer's refusal to bargain as to the decision to contract out plant maintenance work formerly performed by its employees. Id. at 215.

The Court found that

> "The subject matter of the present dispute is well within the literal meaning of the phrase 'terms and conditions of employment.' . . . A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a 'condition of employment.' The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit."

Id. at 120 (citation omitted). The Court based its decision not only on the language of the statute but on the premise that requiring an employer to bargain in the circumstances would promote the purposes of the statute, that such a requirement was supported by industrial bargaining practices in the country, and that it "would not significantly abridge [the employer's] freedom to manage the business." Id. at 210-11, 213.

Accordingly, the Court held

> "that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."

Id. at 215 (footnote omitted).

Although the decision in Fibreboard takes us part of the way, it does not fully determine the issue here: the obligation of an employer to bargain in the case of the closing of part of his facilities. Fibreboard was expressly limited to its facts, and they are distinguishable on the grounds that Fibreboard involved a less significant change in the employer's business. In Fibreboard, after the decision to contract out, the business continued to operate unchanged except for the use of the employees of the subcontractor for those of Fibreboard performing the same work under the same conditions. On the other hand, in a partial closing case, a portion of the employer's business—of course, how large a portion varies with each case—ceases to operate altogether.

Moreover, in Fibreboard, the Court did not specify how the three considerations which it noted—the statute's purpose, industrial practice, and the employer's entrepreneurial prerogative—related to the initial finding whether the statute literally applied. Consequently, it is unclear whether the duty to bargain imposed in Fibreboard derived solely from a finding that the case fell within the literal reach of the statutory language or whether some or all[3] of the additional considerations noted by the Court are necessary to the imposition of a duty to bargain.

The lack of clear direction provided by Fibreboard on this point is made even more difficult by the conflicting positions taken by the NLRB and most circuit courts that, since Fibreboard, have addressed the issue of the duty to bargain in the case of a proposed partial closing.

In Ozark Trailers, Inc., 161 NLRB 561 (1966), the NLRB held to be a subject of mandatory bargaining the decision to close one of the multiple truck manufacturing plants operated by the employer. The Board disagreed with the view espoused by two circuit courts, see NLRB v. Royal Plating & Polishing

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3 This interpretation that all of the Fibreboard "factors" are a prerequisite to a duty to bargain is set forth in the discussion at 47 Geo. Wash. L. Rev. 679, 699 (1979).

Co., 350 F.2d 191 (3rd Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), that the decision whether to impose a duty to bargain should depend on how "significant" or "major" is the change contemplated by the employer. The Board noted that a significant change in the employer's business is likely to be significant from the employees' perspective as well.

> "And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood."

The Board also found that the purpose of the statute—to promote industrial peace—would be served by finding that the employer had a duty to bargain, and that the subject was suited to bargaining because one of the reasons for the Ozark closing was the cost of labor. Finally, the Board noted that imposition of a duty to bargain would not sufficiently abridge the employer's freedom to conduct his business, since

> "an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accomodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision."

On the other hand, the circuit courts until recently have generally declined to impose a duty to bargain as to a partial closing when the decision to close was based on the employer's desire to effect a shift in capital or major change in its business, NLRB v. Adams Dairy, Inc., 350 F.2d 108, 113 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), or was due to severe economic loss or other considerations beyond the employer's control, Royal Typewriter Co. v. NLRB, 533 F.2d,

1030, 1039 (8th Cir. 1976) (dicta); NLRB v. Thompson Transport Co., 406 F.2d 698, 703 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 (9th Cir. 1967); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965). But see NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 517 (5th Cir.), cert. denied, 385 U.S. 935 (1966); NLRB v. American Manufacturing Co., 351 F.2d 74, 80 (5th Cir. 1965).[4]

Recently, in an opinion that exhaustively discussed the relevant legal precedent and policy considerations, the Third Circuit treated the question whether bargaining was mandatory as to a partial closing.[5] In Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734-35 (3rd Cir. 1978), the court rejected a per se rule in favor of "an initial presumption, founded on statutory purposes and language, that a partial closing is a mandatory subject of bargaining," followed by an examination of the facts of each case and balancing the parties' interests in compelling bargaining or not.

On the one hand "[o]f chief concern to the employees is the prospect of losing their jobs. It is in fact difficult to imagine any result of a decision by the employer about which labor

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4 In NLRB v. Rapid Bindery, Inc. 293 F.2d 170, 176, (2d Cir. 1961), the Second Circuit held that the decision to transfer work from one plant to another and to close the first plant

> "was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion. However, once that decision was made, 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move. Nothing affects conditions of employment more than a curtailing of work, and such a curtailment is properly the subject of collective bargaining."

This decision does not compel a result contrary to that reached here since it pre-dates Fibreboard, in which, as indicated, the decision to contract out work which resulted in the layoff of employees was held to be a mandatory subject of bargaining.

5 A provocative treatment of Brockway may be found in Comment, *Duty To Bargain About Termination of Operations:* Brockway Motor Trucks v. NLRB, 92 Harv. L. Rev. 768 (1979).

would be more highly sensitized." Id. at 735 (footnote omitted). Accordingly, a union would naturally seek to bargain with the employer to attempt to find a way to avoid closing the facility. On the other hand, the interest of the employer in not bargaining asserted in Brockway was its "freedom to determine the company's direction" unhindered. Id at 738.

Although the court found no evidence in the record—such as severe economic difficulties or action of a third party which would render bargaining futile—suggesting that imposition of a duty to bargain would interfere with that freedom, id. at 738-39, it refused to enforce the Board's order because the record was unclear as to the precise nature of the employer's interest in not bargaining. Id. at 740.

III.

It may be argued that a per se rule, although rejected in Brockway, 582 F.2d at 731-34, should be adopted: either imposing a duty to bargain whenever an employer closes part of its business (although the NLRB does urge this position), or absolving the employer of a duty to bargain whenever the decision to close is based on economic considerations (which is FNM's position). Yet we agree with the Third Circuit that a per se rule is inappropriate in an area whose parameters are not clearly defined by the statute or by Supreme Court precedent.

Although the rationale of Fibreboard is not altogether clear, we believe that the decision at least supports the rejection of a per se rule imposing a duty to bargain, since such a rigid approach would ignore additional relevant considerations such as the three mentioned by the Court. Fibreboard also indicates the inappropriateness of a per se rule pointing in the other direction. In rejecting the contention that the employer should not have to bargain because its decision was based on economic considerations, the Court stated:

> "although it is not possible to say whether a satisfactory solution could be reached, national labor policy is

> founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."

379 U.S. at 214; see Brockway, supra, 582 F.2d at 739.

We also agree with the Brockway court that the correct aproach is to establish a presumption that a duty to bargain exists. A partial closing[6] affects "terms and conditions of employment" at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute. Equally important is the fact that it is the employer who has access to the facts surrounding the decision to close, and consequently is in a position to justify its making that decision without first bargaining over it.

However, we disagree with Brockway that a determinative factor should be a balancing of the respective interests of the employer and employees in bargaining. We believe that the

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6 In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), the Supreme Court held that

> "when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."

Id. at 273-74 (footnote omitted). The Court distinguished a "partial" closing, however, and held that

> "a partial closing is an unfair labor practice under 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."

Id. at 275. That case did not involve the question whether the employer's decision constituted a mandatory subject of bargaining, as the Court noted that

> "no argument is made that 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. Cf. Fibreboard Paper Products Corp. v. Labor Board, 379 U.S. 203."

Id. at 267 n.5.

Since the issue is not before us, we express no opinion as to whether the distinction between a complete and partial closing recognized in Textile Workers is significant in a mandatory bargaining case.

determination whether to impose a duty to bargain should not depend on the relative injury to the employer and the employees, but rather on the relative merits of the arguments put forth as to those classic considerations of whether the purposes of the statute are furthered by the decision to impose a duty to bargain in a particular case.

Accordingly, the presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain. Without an attempt to enumerate all those instances in which the presumption may be rebutted, a few examples may be noted for purposes of illustration. The employer might overcome the presumption by demonstrating that bargaining over the decision would be futile, since the purposes of the statute would not be served by ordering the parties to bargain when it is clear that the employer's decision cannot be changed. Other relevant considerations would be that the closing was due to emergency financial circumstances, or that the custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business, so that the purposes of the statute would not be furthered by mandating bargaining to benefit some employees to the potential detriment of the remainder. This might be a particularly significant point if the number to be laid off was small and the number of the remainder was large.[7]

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7 The dissent maintains that despite our purported rejection of a per se rule favoring the imposition of the duty to bargain, in effect one has been adopted. This is not so because, as discussed in the text above, our ruling would exclude the imposition of a duty to bargain on a showing that the purposes of the statute would not be furthered by mandating in a particular case. We have suggested several examples of situations in which such a showing might be made.

IV.

Turning to the present case, the decision to close the Greenpark operation clearly falls within the literal language of the statute. That decision terminated the employment of FNM's 35 employees, there, and, as the Supreme Court has said, the words "terms and conditions of employment" do "plainly cover termination of employment." Fibreboard, supra, at 210.

FNM has offered no evidence to rebut the presumption arising from the literal application of the statute, but merely asserts that it was losing money on Greenpark. However, as discussed above, although certain considerations generally relating to economics may render bargaining futile and therefore nonobligatory, FNM has not shown that to be true of the considerations it claims prompted its decision to terminate the Greenpark operation.[8]

The dissent, noting that, as the Administrative Law Judge found, the company was losing money at Greenpark, argues that FNM was not required to bargain over the decision to terminate the Greenpark operation because those losses were not attributable to labor costs, since under the contract between Greenpark and FNM Greenpark paid FNM's employees' salaries and fringe benefits, plus a management fee. We believe, however, that the critical question is whether the purposes of the statute are advanced by imposition of a duty to bargain and that that determination does not depend solely on whether the costs precipitating the decision to terminate were not labor originated. What appears to us to be the decisive factor, is whether, regardless of the origin of the cost which

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8 The dissent, relying on Justice Stewart's concurrence in Fibreboard, concludes that FNM's decision was "a matter of fundamental entrepreneurial discretion." Although we have indicated our agreement that certain decisions may be within managerial prerogative and not subject to mandatory bargaining, the appropriate analysis to determine whether such a decision is involved in the case at hand is to inquire whether the imposition of a duty to bargain would further the purposes of the statute.

precipitated a management decision to terminate an operation, bargaining could reasonably be expected to modify or reverse that decision. On the record here, for example, there is sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution. Moreover, the dissent appears to us to be unsound in placing emphasis on the question whether the company's difficulties are attributable to non-labor costs alone. As we see it, such difficulties are the product of the company's entire history and arise from the sum of the costs involved in running a business.

Accordingly, we find that FNM had a duty to bargain with the union as to its decision to close the Greenpark operation.[9]

FNM argues that it nevertheless did bargain with the union on July 28th and 29th, and therefore satisfied its duty to bargain as to its decision to close its Greenpark services.

However, the telephone conversations, initiated by the union, consisted of little more than Marsh informing Wecker that FNM was "pulling out" of Greenpark for financial reasons and that there was "nothing to discuss."[10] It is difficult to

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9 In Brockway, the court declined to enforce the NLRB order and remanded because of the insufficient factual record to enable it to balance the employer's interest in not bargaining. 582 F.2d at 739-40. That course is unnecessary here. Neither party has claimed, and we do not find, that the record is insufficient to permit determination of the question before us. See Electrical Products Division of Midland-Ross Corp. v. NLRB, No. 78-2556, Slip op. at 8-9, 103 LRRM 2908 (3d Cir. March 18, 1980).

10 Marsh stated during the telephone conversation that if FNM stayed at Greenpark one day, it was then bound to stay for a full 30 days. There was also some discussion concerning the possibility of persuading Greenpark to waive the 30-day contractual provision.

conceive of conduct which more clearly constitutes a failure of good faith bargaining to an impasse.

V.

FNM argues that the Board abused its power by ordering FNM to reinstate the terminated employees and awarding them backpay. The Board answers that FNM failed to except to the remedy before the Board and is therefore precluded from objecting to it here.

A condition to the right to object to the enforcement of remedy ordered by the NLRB is that the party opposing must have excepted to the remedial portion of the order before the NLRB. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350 (1953); National Labor Relations Act 10(e), 29 U.S.C. 160(e).

FNM contends that its exceptions to the ALJ's decision and its accompanying brief objected to the remedial portion of the order. This is simply not supported by the documents[11] themselves which do not mention the remedy ordered.

FNM next argues that the General Counsel's cross-exceptions to the decision questioned the relief ordered and "fully bring the question of remedial relief before the Board within the meaning of Section 10(e)." However, the Board's exceptions did not object to the remedy ordered. Rather they request further relief in addition to that ordered. The General Counsel's exceptions could not have the effect of notifying the NLRB that FNM "intend[ed] to press the specific issue it now

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11 The exceptions to the ALJ's decision were:

"1. Exception is hereby taken to the conclusion of the Administrative Law Judge that the Respondent was under a duty to bargain with the Union over the decision to terminate the contract with Greenpark Care Center. . . ."

"2. Exception is hereby taken to the conclusion of the Administrative Law Judge that the Respondent failed to bargain with the Union over the effects of its decision to close the operation. . . ."

raises." NLRB v. Seven-Up Bottling Co., supra, 344 U.S. at 350.

The petition for enforcement is granted.

Concurring and Dissenting Opinion

KEARSE, Circuit Judge, concurring in part and dissenting in part:—I must respectfully dissent from so much of the majority's decision as holds that respondent violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(5), 158(a)(1) by refusing to bargain over its decision to close its Greenpark operation, and I would therefore deny enforcement of so much of the NLRB's order as directs respondent to pay backpay to the employees terminated.

I

There is no question that respondent failed to bargain with the union, nor any question that it was required to bargain over the effects of its decision to terminate its operations at Greenpark Care Center ("Greenpark"). See NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961); Morrison Cafeterias Consol. Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965). To this extent I would affirm the Board's findings that respondent violated the Act.

I cannot agree, however, that respondent violated the Act by refusing to bargain over the decision to terminate. The decision to end services at Greenpark was made in order to stop losing money. This is not a case in which, as the majority states, the respondent "merely asserts" that it was losing money on the Greenpark operation. The record indicated that during the spring of 1977 respondent had repeatedly sought an increase in its fee in order to enable it to continue services at Greenpark, stressing to Greenpark's management that respondent was

losing money. The Administrative Law Judge ("ALJ") found this assertion to be true: *"It is a fact the Respondent was losing money on this job."* (Emphasis added.)

Further, in the present case the contract between respondent and Greenpark required Greenpark, in addition to paying a set management fee, to pay respondent's "gross weekly payroll and fringe benefits" for that facility. It was the amount of the management fee, over and above the labor costs, on which respondent and Greenpark could not agree. Thus, the facts are that respondent was losing money on the Greenpark job, that its losses were not due to labor costs,[1] and that its solution for these losses was to close down the losing operation.

I do not believe that the carefully limited decision in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), or any other authority, requires the respondent to bargain over its decision to terminate Greenpark in order to halt these losses.[2]

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1 This distinguishes such cases as Ozark Trailers, Inc., 161 NLRB 561 (1966) in which the company's actions were prompted in large part because of the cost of labor. Even in a case where a partial closing is due to labor costs, it may be that a labor union's legitimate interests are adequately protected by the employer's duty to bargain over the effects of the closing, as distinguished from the decision itself to close. There is no need to reach that question here.

2 The majority states that, like the Third Circuit in Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978), it recognizes merely a presumption, and not a per se rule, that there is a duty to bargain over a partial closing. Looking at the results of the two cases, however, it appears to me that the majority comes rather near to imposing that per se rule. In Brockway, the parties had stipulated that the partial closing was based on "economic considerations." The nature of these considerations was not disclosed in the record, and thus it could not be known whether or not that respondent had actually been losing money on the closed operation. In those circumstances the presumptive duty to bargain was not adequately rebutted. Yet the Brockway court did not grant enforcement, but denied the Board's petition without prejudice. In the present case, the established facts are considerably less compelling from the Board's point of view. There is a record on which the ALJ expressly found that in fact respondent was losing money; and the record shows that those losses were not due to labor cost. Yet here, the majority promptly grants enforcement.

See Morrison Cafeterias Consol. Inc. v. NLRB, supra. In Fibreboard the Supreme Court ruled that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" violated the requirement of § 8(d) of the Act that an employer bargain about "conditions of employment." Id. at 215. Unlike the present case, Fibreboard involved the replacement of employees in an ongoing operation. (And unlike the present case the costs sought to be shaved in Fibreboard were labor costs.) The opinions in Fibreboard are instructive in distinguishing its "contracting out" situation from that of the present case.[3] Thus, the majority opinion observed as follows:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.
>
> The company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework . . .

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3 Far from deciding such questions as a decision to terminate an operation altogether, Fibreboard did not purport to reach even "other forms of 'contracting out' or 'subcontracting.' " Id. at 215.

Id. at 213-14. Justice Stewart's concurring opinion stresses that certain managerial decisions, such as the decision to close a business, which obviously will affect employment, do not implicate "conditions of employment" within the meaning of § 8(d):

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Id. at 223.

I conclude that the respondent's decision in this case to conserve its capital by closing a losing operation was a matter of fundamental entrepreneurial discretion and was not "suitable for resolution within the collective bargaining framework."

II

Respondent has challenged in this Court both the order directing it to reinstate terminated employees and the backpay award. The Board argues that these questions are not properly before the Court because respondent's letter of exceptions to the ALJ's decision was "silent on remedy and too general in form to have placed the Board on notice that the Company objected to the remedy in the event its position did not prevail." (Board brief at 21.) This position has some merit with

respect to the Board's direction that respondent offer to reinstate terminated employees in comparable positions in other facilities served by respondent; that order was properly based on respondent's failure to bargain over the effects of its termination decision, and I would agree that respondent is barred from attacking that portion of the remedy.

Nevertheless, I would not hold the respondent barred from challenging the backpay award, because that award is based on the determination that the company violated the Act by failing to bargain over the termination decision itself. Since I find this premise faulty, I find no basis for the backpay award and would deny enforcement of that portion of the Board's order. NLRB v. Rapid Bindery Inc., supra, 293 F.2d at 177.

APPENDIX B

National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), (5), 158(d)

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage of discourage membership in any labor organization. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

BLS-A—Relevant Excerpts from U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 1425-10, *Major Collective Bargaining Agreements* (1969)

Chapter II. Plant Movement

Prevalence

Of the 1,823 agreements examined, 21.5 percent had clauses limiting plant movement as defined for purposes of this study (table 1). These provisions covered 2.9 million workers or slightly more than 38 percent of the total. Although manufacturing industries accounted for three-fifths of all agreements, only 25 percent included plant movement provisions. In nonmanufacturing, almost 17 percent of the agreements had plant movement provisions.

Plant movement provisions were found in 20 or more agreements in each of seven industries. Only two of these industries had a significantly higher frequency of provisions than the all industries prevalence of 21.5 percent—the apparel industry, where 43 of 55 agreements or 78.2 percent had these provisions, and the transportation industry which had 49 of 91 agreements or 54 percent.

Provisions that specify the protections available to employees when the location of an establishment has been changed represent a collective bargaining response to changes that are occurring within almost all industries. Apparel, for example, has been establishing new facilities rather than renovating old plants when instituting new production methods. Since the new facilities are frequently located outside the usual garment districts, the union and workers consider themselves plagued by runaway plants. To counteract this movement, the Ladies' Garment Worker's Union (ILGWU), long a dominant force in policing and stabilizing the industry, has negotiated contract provisions limiting the production area in an effort to retain its jurisdiction and to preserve job opportunities for its members. In the case of trucking, there has been a trend toward merger

into larger firms and hence, more extensive and efficient terminals. The Teamsters have negotiated provisions safeguarding the status of workers transferred as a result of consolidations of existing terminals and the opening of new ones. In contrast, contracts in the apparel industry were designed to limit plant movement itself.

Nine major unions accounted for over two-thirds of the agreements having plant movement provisions. Approximately one-third (271) of all major agreements negotiated by the nine unions included plant movement provisions as compared to a total prevalence of one-fifth for all the agreements in the study. These 271 contracts covered 2.3 million workers or 79 percent of the 2.9 million workers covered by agreements having plant movement clauses, considerably more than their proportionate representation (49 percent) of the workers under all major agreements.

	Total studied		Agreements having plant movement limitatinons	
	Agreements	Workers (in thousands)	Agreements	Workers (in thousands)
Total, all unions.....	1,823	7,339.2	392	2,873.1
Total, nine unions	764	3,654.9	271	2,277.3
Autoworkers.....	118	995.2	39	738.2
Clothing workers.....	19	165.3	12	143.3
Electrical workers (IBEW)..	110	295.8	16	29.0
Garment workers (ILGWU).	42	257.0	36	242.8
Machinists.....	89	285.7	16	76.0
Meat cutters	50	142.8	19	66.7
Retail clerks	48	137.0	18	64.0
Steelworkers.....	120	587.8	42	430.7
Teamsters	168	748.4	73	486.6
Other.....	1,059	3,724.3	121	595.8

NOTE: Because of rounding, sums of individual items may not equal totals.

Among the nine unions were the Autoworkers, whose 39 plant movement provisions out of 118 agreements (33 percent) represented 74 percent of the workers covered by those agreements, and the Steelworkers, whose 42 out of 120 agreements (35 percent) represented 73 percent of their covered workers.

When the agreements were divided into groups according to size of bargaining unit, the proportion of agreements having plant movement provisions increased with the size of the bargaining unit. In the first two size groups, the proportion of agreements and workers were approximately the same. In the largest size group, however, the proportion of workers greatly exceeded that of agreements.

Limitations on Plant Movement

In the main, the purposes of clauses limiting plant movement is to safeguard the employment status of workers covered by the contract. However, there also are provisions which protect the union's jurisdiction in cases where companies merge, plants relocate, or new additions are built. Six industries, each having over 30 clauses, accounted for three-fifths of all provisions permitting plant movement subject to restrictions (table 1).

These included the two industries previously cited as generally having major clusters: Apparel, with 43 agreements; and transportation, with 49 agreements. Four additional industries were: (1) Transportation equipment (38); (2) food (38), especially meat products, where obsolete plants continue to be replaced by modern facilities, and dairy products where the number of plants is declining while plant size is increasing; (3) primary metals (32), were plant and equipment expenditures in recent years have been spent largely for the replacement and modernization of facilities; and (4) retail trade (35), where additional stores continue to be built, and either union or contract jurisdiction frequently is extended to the new facility.

Agreements	Size of bargaining unit							
	Total, all units		1,000-4,999 workers		5,000-9,999 workers		10,000 workers and over	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
Total.....	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Includes provisions.	29.7	45.2	27.3	28.6	39.0	39.2	44.9	62.0
Without provisions.	70.3	54.8	72.7	71.4	61.0	60.8	55.1	38.0

Management Rights[3]

Employers have traditionally maintained that some functions which they consider essential to efficient plant operation are not negotiable. Virtually all agreements include "management rights" or "management prerogative" clauses which frequently enumerate functions to be exercised solely by the employer, but these may be modified in other sections of the agreements, as in most of the 392 discussed earlier. In 150 (8 percent) of the agreements examined for this report, management retained the right to move or relocate a plant unrestricted by any other provision in the agreement. There was a higher proportion of these clauses in manufacturing than in nonmanufacturing agreements, with concentrations in primary metals, electrical and nonelectrical machinery, and transportation equipment.

Generally, the reservation of the right to move a plant amplified management prerogatives. The contract language emphasized the fact that the parties had agreed that this function was one that only the employer could exercise:

> (1) Without intending by the language of this section to limit the functions and prerogatives of management or to define all of such functions and prerogatives, it is agreed that the following are the exclusive functions of the employers . . . the right to decide the number and location of its plants, the creation of new departments and the elimination of existing departments in a plant . . .
>
> (2) The union recognizes other rights and responsibilities belonging solely to the company, prominent among which is the right to decide the number and location of plants . . .

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3 A discussion of this subject also is included in *Major Collective Bargaining Agreements, Management Rights and Union-Management Cooperation* BLS Bulletin 1425-5, pp. 15-16.

(3) It shall be the sole right of the company to diminish operations in whole or part or to remove a plant for operation or business of same or any part thereof, to any location as circumstances may require.

Notice and Participation Provisions

Slightly more than 30 percent of the agreements having these provisions stipulated that the union would be notified or would participate in a management decision to move a plant. Notice and participation provisions represent a fundamental safeguard for both union and employer. In the event of a plant shutdown or move, the union is afforded an early opportunity to prepare for the effects of these decisions on workers. In designing negotiation and participation clauses, the parties have followed the example of similar provisions in the field of subcontracting.[4] This is not unexpected, since both plant movement and subcontracting issues, as well as many others, concern basic job security.

The clauses examined were divided equally into two groups: Those which specifically provided for notice of, or consultation about, plant movement decisions (60 agreements); and those which specifically involved the impact that these decisions might have upon the work force (59 agreements).

Among the 60 agreeements dealing with the decision to move, 46 provided only that advance notice of plant movement would be given. (See above tabulation.) Two additional agreements combined advance notice with other forms of union participation in the decision. Advance notice clauses were typically worded as follows:

(4) It is agreed that the employer will give the union one week's written notice of his intention to cease operations, or to sell, transfer, or otherwise dispose of the business.

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4 See *Major Collective Bargaining Agreements, Subcontracting* BLS Bulletin 1425-8.

Industry	Total		Requirement applies to—			
			Decision to close or relocate plant		Effects of shutdown or relocation	
	Agreements	Workers (in thousands)	Agreements	Workers (in thousands)	Agreements	Workers in thousands)
All industries	119	939.7	60	408.2	59	531.5
Manufacturing	104	895.4	52	392.3	52	503.1
Food and kindred products	16	68.1	15	65.8	1	2.3
Apparel and other finished products	18	196.4	16	186.4	2	10.0
Primary metals	24	362.4	—	—	24	362.4
Other manufacturing	46	268.6	21	40.3	25	128.3
Nonmanufacturing	15	44.3	8	15.9	7	28.4

[1]Excludes railroad and airline industries.

NOTE: Because of rounding, sums of individual items may not equal totals.

Industry	Total		Consultation, discussion or bargaining		Periodic review	
	Agreements	Workers (in thousands)	Agreements	Workers (in thousands)	Agreements	Workers in thousands)
All industries	59	531.5	35	282.6	24	248.8
Manufacturing	52	503.1	28	254.2	24	248.8
Nonmanufacturing	7	28.4	7	28.4	—	—

[1]Excludes railroad and airline industries.

NOTE: Because of rounding, sums of individual items may not equal totals.

(5) . . . Further the company agrees to notify the union sixty days before it closes a plant on a unit thereof which would result in the permanent layoff of the majority of the employees in that plant or unit.

(6) Employer will not, without reasonable notice to the union, remove or cause to be removed from Andalusia, Alabama, its present plant or plants in Andalusia, Alabama.

To some extent, the prevalence of advance notice of movement decisions is understated. That is, it is implicit that agreements (59) providing for negotiation concerning the impact of the decision must necessarily provide advance notice of the decision. In some clauses, this relationship is stated in the following manner:

(7) It is understood and agreed that the company reserves the right to expand, limit, or curtail its operations, or to close down completely when the company considers it advisable to do so. In the event of any such change of major proportion, the union will be notified at once, and at the request of the union the company will meet with the union bargaining committee to consider the seniority provisions of this agreement.

(8) The company agrees to advise [the union] promptly of any plans for a major transfer of operations into or out of its [plants] and to institute negotiations with you promptly for the purpose of consummating an agreement with respect to the move as it may affect [plant] and other employees of the company.

(9) The company will give the union at the division level a 60-day notice of its intentions to transfer and consolidate two or more area headquarters offices. The parties shall meet at the division level for the purpose of effectuating the provisions of this agreement and negotiating on matters not covered by the contract or this agreement. . . .

By the same token, it is implied that clauses providing for easing the impact of a decision to close or move a plant also must provide prior notice, although this may not be stated in the agreement.

The 14 agreements involving the decision to move assigned a more active role to the union than did those providing for notice only. Three of these required a discussion between the union and the employer.

> (10) . . . The company's right to go out of business; to abandon territory; and to abandon the processing and packaging of a product withdrawn from distribution shall not be impaired. . . . However, such rights shall not be exercised until a conference is held with the union to discuss the necessity for such action.

The remaining 11 agreements, 10 in the apparel industry and 1 in leather products, required the consent of the union prior to an employer's relocating the plant or constructing additional facilities. The third illustration requires arbitration if the union withholds its consent to the move:

> (11) The employers shall not remove their shops from the city where they are presently located, without the consent of the union.
>
> (12) No member of the association shall move his inside shop from the premises where his shipping facilities, showroom and/or cutting department are located, without the consent of the union, nor shall any member of the association move his cutting department or his entire business to any point outside of the Boroughs of Bronx, Brooklyn, Manhattan, Queens and Richmond.
>
> (13) In order to protect the regularity of employment of the workers employed by the respective members of the association, it is agreed that should a member of

> the association, during the term of this agreeement, desire to establish or maintain an additional shop or factory or add any other facilities for the manufacture of work in operations covered by this agreement, in place or places other than its regular shop or factory, it shall first notify the union in writing of its intention and no such additional facilities shall be added unless it first secures the written consent of the union. In the event that the union shall fail to give such consent, the matter shall be deemed a dispute and shall be submitted to the impartial chairman for final determination in the same manner as any other dispute herein.

Many collective bargaining agreements include measures designed to soften the impact of plant shutdown or relocation on the workers. Subsequent sections of this bulletin discuss related issues such as interplant transfers and relocation allowances. Bulletin 1425-2 dealt with severance pay and layoff benefit plans whereas other bulletins in this series described training and retraining and subcontracting provisions.[5] In the present study, however, 59 agreements were found that provided for union management negotiation or other administrative participation by the union intended to ease the impact of the planned shutdown or movement.

Twenty agreements in the primary metals industry together with two each in the fabricated metal products and transportation equipment industries provided for a periodic review of contract clauses pertaining to shutdown or movement:

> (14) The operation of this section [pertaining to plant closings, interplant transfer, relocation allowances, etc.] will be subject to periodic review by a joint committee, consisting of equal numbers of representatives of both parties (not more than three each), who shall meet periodically to review the operation of this section and to consider and resolve any

5 See *Major Collective Bargaining Agreements, Training and Retraining*, BLS Bulletin 1425-7 and *Subcontracting* 1425-8.

Industry	Total		Notice only		Consultation, discussion, or bargaining		Union approval or joint agreement	
	Agreements	Workers (in thousands)	Aggrees ments	Workers (in thousands)	Agreements	Workers (in thousands)	Agreements	Workers (in thousands)
All industries....	60	408.2	46	218.9	3	4.8	11	184.5
Manufacturing	52	392.3	38	203.0	3	4.8	11	184.5
Nonmanufacturing.	8	15.9	8	15.9	—	—	—	—

[1]Excludes railroad and airline industries.
NOTE: Because of rounding, sums of individual items may not equal totals.

problems that may arise from its operations. The company shall supply to such committee pertinent information relating to the operation of this section.

The remaining provisions stipulated that the union would be consulted or that methods to ease the impact of the decision would be subject to discussion or negotiation. The issues to be discussed were not set forth, probably because the exact nature of the problems could not be anticipated:

(15) In the event of transfer of operations from one plant to another or shutdown of a plant causing permanent lay-offs, the company agrees to discuss the matter with the international union as soon as reasonably possible after the necessity of such transfer or shutdown has been determined, in an effort to work out the problem on a reasonable basis.

In other cases, however, negotiators have agreed on specific procedures in which to ease the impact, as reflected in clauses concerning transfers, preferential hiring, and moving allowances:

(16) The company also agrees that in the event a decision is made to completely and permanently discontinue either the foundry section or the machine shop section of Milwaukee Works, the union is reserving the right to re-open negotiations with respect to the transfer of employees from the discontinued section to the surviving section.

(17) If one of the plants covered by this agreement were closed, or if an entire department of that plant were closed and the operations involved were then moved to some other plant operated by the company, the company would negotiate with the union upon its request to determine whether or not an equitable plan could be devised to give the employees who had performed the operations that were moved a preference to employment at the plant to which the opera-

tions were moved, and to transfer the employees' seniority to such new plant. . . .

(18) In the event that the company shall close any of its Muskegon plants, or portions thereof, and move them to new plants outside the Muskegon area, the company agrees that it will notify the union as to the locations of such plants, the number of shop employees and skills required to operate such new plants, and employees within such numbers and having the required skills will be permitted to move to the new plant locations and carry with them the seniority which they have at the time of the closing of the Muskegon plants. The company will notify the union if it is necessary to employ people out of line of seniority to place such new plants in productive operations.

The company and the union will then review the number of persons and classifications so presented to the union by the company. This review will cover the number of persons losing their employment because of such plant closings and the work classification and experience of such persons.

The company will also meet with the union with reference to allowances for moving expenses, if any, for the employees displaced by the plant closings, and whom the company and the union agree are qualified to perform the work available at the new locations.

Other agreements (20) dealing with the impact of plant movement or shutdown decisions provided for advance notice. Advance notice provisions, either by themselves or in combination with other forms of participation, were found in 68 of the 119 union participation agreements. Advance notice could be sent to the union, posted on plant bulletin boards, or sent directly to the employees concerned. In some cases, more than one notice might be required; first, a general notice of future

plant closing, and then a specific notice of layoff, as in the following:

> (19) Whenever the company decides to close a plant, the company shall give notice of its decision to the employees concerned and to their representatives if any. Thereafter, as the company, in the course of such plant closing, no longer has need for the work then being done by any employee, his employment by the company may be terminated, subject only to compliance with the provisions of this section.
>
> Each employee shall be given at least one week's advance notice of the specific date of his termination.

Of the agreements providing for advance notice of moves, about one-third were not specific as to a time period, requiring only that advance notice be given. The decision not to set forth precise time limits indicates that the parties did not consider a minimum advance notice time necessary, as the decision would be announced as soon as plans were final. In any event, preparations for a plant move would constitute a form of notice. Accordingly, the indefinite notice provision allows flexibility, and at the same time expresses the good faith intent of the employer to notify the union and workers of its decision:

> (20) . . . Should the company, due to economic or other reasons, decide to discontinue any operations or portions of an operation it will notify the union in advance.
>
> (21) Should the employer desire to expand and open additional factories, notice thereof shall be given by said employer to the union prior to the opening of such factories and an agreement shall be negotiated affecting such factories.
>
> (22) The company shall notify the international union in advance of any plant closing. . . .

The remaining agreements stated the length of advance notice to be given. Time periods ranged from as little as 1 week—the equivalent of a layoff notice—to as much as 6 months in one agreement. The only noticeable clusters appeared at 1 month and at 90 days, the latter largely in meatpacking.

In terms of planning for plant movement, i.e., for negotiating and making adjustments to provide workers with some degree of protection, even a 1-month period puts urgent time pressure on management and union negotiators. It could be reasonably assumed that stipulated time limits are minimums, and the decision to move will be made known far in advance. The employer's argument for not giving more extended notice usually is based on the premise that workers will leave for other jobs before production ceases.

Period	Agreements	Workers (in thousands)
Total	68	333.4
Less than 3 months	25	144.2
More than 3, less than 6 months	21	106.1
6 months to 1 year	1	1.3
Unspecified	21	81.8

Occasionally, advance notice provisions will permit a waiver of the time limit, as in the following clause, when circumstances beyond management's control preclude meeting the notification requirement:

> (23) The council member will notify the union two (2) weeks in advance of the actual closing of a store, unless the closing is caused by circumstances beyond the council member's control.

To assure the safe transmittal of notice, at least one agreement specified that the notice had to be written and sent by either registered or certified mail:

> (24) The employer shall give the unions three weeks' prior written registered or certified notice of its intention to close permanently any store.

Although agreements that provided for union participation were equally divided between clauses involving a decision to move and those dealing with the impact of the move, some important differences showed up at the industry level. Industries that are characterized by a high degree of worker mobility or a relatively large number of small establishments tend to have clauses relating to the decision to move, as in retail food stores or in the apparel industry. In industries having fewer establishments and less mobility, such as primary metals, union participation clauses are more apt to deal with the impact of plant movement or shutdown (see tabulation, page 4).

TABLE 1 Plant Movement in Major Collective Bargaining Agreements, by Industry, 1966-67

Workers in thousands

Industry	Total agreements studied		Movement permitted subject to limitation, perquisites or obligations with regard to old plant, new plant or both		No explicit limitations, perquisites, or obligations					
					Total		Expressed in management rights clause only		No reference	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
All industries	1,823	7,339.2	392	2,873.0	1,431	4,466.2	150	445.8	1,281	4,020.5
Manufacturing	1,048	4,155.5	263	2,091.9	785	2,063.6	139	398.8	646	1,664.8
Ordnance and accesories	18	69.9	5	27.2	13	42.7	5	25.1	8	17.6
Food and kindred products	126	382.0	38	131.8	88	250.3	9	15.5	79	234.9
Tobacco manufactures	11	24.2	1	1.1	10	23.1	2	3.3	8	19.8
Textile mill products	30	71.8	6	23.1	24	48.8	8	14.0	16	34.9
Apparel and other finished products	55	392.0	43	360.5	12	31.6	—	—	12	31.6
Lumber and wood products except furniture	13	24.6	1	2.0	12	22.6	2	3.4	10	19.2
Furniture and fixtures	18	29.6	2	3.0	16	26.6	3	3.4	13	23.2
Paper and allied products	50	112.2	7	12.2	43	100.0	4	5.7	39	94.3

Industry	Total agreements studied		Movement permitted subject to limitation, perquisites or obligations with regard to old plant, new plant or both		No explicit limitations, perquisites, or obligations					
					Total		Expressed in management rights clause only		No reference	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
Printing, publishing and allied industries	28	59.1	2	11.6	26	47.5	1	1.2	25	46.3
Chemicals and allied products	61	106.8	6	12.0	55	94.8	10	18.5	45	76.4
Petroleum refining and related industries	20	44.9	3	9.8	17	35.1	1	1.0	16	34.1
Rubber and miscellaneous plastics products	21	107.6	5	10.9	16	96.7	1	5.7	15	91.0
Leather and leather products	23	73.8	10	51.2	13	22.6	2	4.5	11	18.1
Stone, clay, and glass products	37	115.5	7	53.2	30	62.3	5	9.0	25	53.3
Primary metal industries	106	545.7	32	384.0	74	161.8	13	24.3	61	137.5
Fabricated metal products	55	129.9	15	56.6	40	73.3	9	13.3	31	60.1
Machinery, except electrical	115	314.6	20	73.5	95	241.1	19	70.7	76	170.5

Electrical machinery, equipment, and supplies	106	398.7	13	104.2	93	294.5	18	79.1	75	215.4
Transportation equipment	118	1,075.5	38	739.2	80	336.3	25	98.8	55	237.5
Instruments and related products	25	48.6	5	9.0	20	39.7	2	2.6	18	37.1
Miscellaneous manufacturing	12	28.9	4	16.1	8	12.8	—	—	8	12.8
Nonmanufacturing	775	3,183.8	129	781.2	646	2,402.6	11	47.0	635	2,355.7
Mining, crude petroleum, and natural gas production	16	111.4	6	88.6	10	22.8	2	2.5	8	20.3
Transportation [1]	91	607.0	49	444.2	42	162.8	—	—	42	162.8
Communications	88	524.9	3	24.5	85	500.4	1	9.2	84	491.3
Utilities: Electric and gas	80	180.0	13	24.0	67	156.0	3	6.6	64	149.4
Wholesale trade	19	35.3	9	18.3	10	17.0	—	—	10	17.0
Retail trade	119	317.6	35	107.4	84	210.3	1	2.5	83	207.9
Hotels and restaurants	37	171.5	7	31.8	30	139.7	—	—	30	139.7
Services	65	258.2	6	25.6	59	232.6	4	26.2	55	206.4
Construction	256	970.9	1	17.0	255	953.9	—	—	255	953.9
Miscellaneous nonmanufacturing	4	7.2	—	—	4	7.2	—	—	4	7.2

[1] Excludes railroad and airline industries.

NOTE: Because of rounding, sums of individual items may not equal totals.

BLS-B—Relevant Excerpts from U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978* (1980)

TABLE 7.6 Advance notice provisions by industry

(Agreements covering 1,000 workers or more, January 1, 1978)

Industry	All agreements		Requiring advance notice							
			Total		Layoff		Plant shutdown or relocation		Technological change	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
All industries	1,536	7,054,550	795	4,041,250	669	3,346,100	160	710,800	171	1,221,350
Manufacturing	770	3,377,150	506	2,310,850	435	1,928,600	113	459,950	87	722,050
Food, kindred products	84	234,550	51	116,850	40	80,100	17	47,200	9	25,850
Tobacco manufacturing	9	23,850	9	23,850	6	17,500	6	12,650	1	1,200
Textile mill products	13	28,900	7	18,600	2	2,700	—	—	5	15,900
Apparel	44	371,550	11	107,900	2	6,500	5	12,700	6	97,900
Lumber, wood products	11	18,900	3	6,500	3	6,500	1	2,300	—	—
Furniture, fixtures	12	20,050	6	7,800	5	6,600	1	1,200	—	—
Paper, allied products	49	86,600	27	52,150	12	28,650	9	14,300	13	22,250
Printing and publishing	23	48,400	22	46,200	18	40,600	6	8,050	16	35,450
Chemicals	41	78,400	29	52,450	27	48,050	1	1,050	6	12,850
Petroleum refining	16	30,150	11	21,250	10	18,750	5	8,850	1	1,700
Rubber and plastics	19	95,750	14	57,100	12	31,450	4	36,900	1	24,000
Leather products	12	25,050	5	9,800	3	6,300	2	3,500	1	1,000
Stone, clay, and glass	31	92,600	26	84,250	22	74,450	14	49,100	8	21,200
Primary metals	74	421,550	35	158,750	31	97,500	7	75,650	—	—
Fabricated metals	43	99,850	33	84,750	30	77,450	7	13,700	—	—

Industry	All agreements		Requiring advance notice							
			Total		Layoff		Plant shutdown or relocation		Technological change	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
Machinery	80	251,500	70	228,900	70	228,900	11	47,250	7	12,550
Electrical machinery	77	361,300	58	300,150	56	228,350	8	96,900	1	9,000
Transportation equipment	107	1,034,700	72	896,600	70	894,150	6	22,100	10	438,300
Instruments	13	30,700	12	29,600	11	26,700	3	6,550	1	1,100
Miscellaneous manufacturing	12	22,800	5	7,400	5	7,400	—	—	1	1,800
Nonmanufacturing	766	3,677,400	289	1,730,400	234	1,417,500	47	250,850	84	499,300
Mining, crude petroleum, and natural gas.	15	167,000	6	148,200	4	133,200	—	—	3	140,000
Transportation[1]	76	665,600	35	322,700	25	215,200	18	142,200	4	15,100
Communications	69	600,900	54	508,450	52	499,750	3	18,250	5	64,550
Utilities, electric, and gas	73	212,350	49	148,950	46	128,500	2	3,850	10	39,050
Wholesale trade	16	28,250	10	19,800	6	12,300	1	1,000	4	7,500
Retail trade	123	429,750	82	323,250	59	218,500	14	42,750	44	165,250
Hotels and restaurants	37	172,400	13	73,000	11	54,200	2	7,000	3	21,750
Services	71	392,550	30	154,150	22	125,350	5	30,800	11	46,100
Construction	286	1,008,600	10	31,900	9	30,500	2	5,000	—	—
Miscellaneous nonmanufacturing	—	—	—	—	—	—	—	—	—	—

[1] Excludes railroads and airlines.

NOTE: Nonadditive.